

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

OAH No. N 2005120175

v.

IRVINE UNIFIED SCHOOL DISTRICT,

Respondent.

DECISION

Darrell L. Lepkowsky, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on March 8, 9, 10, 13 and 14, 2006, in Irvine, California.

Petitioner (Student) was represented by her Mother and her Mother's friend.

Sundee Johnson, Esq., of Atkinson, Andelson, Loya, Ruud & Romo, represented Respondent, the Irvine Unified School District (IUSD or District). Also present for the course of the hearing was Liz Krogdalen, the District's Coordinator of Special Education.

Also present at the hearing was Mr. Chan, a Mandarin Chinese interpreter. During the course of the hearing, Mother sometimes requested direct interpretation and sometimes requested testimony be given in English, with Mr. Chan present to assist her when needed.

Testimony concluded, the record closed, and the matter was submitted on March 14, 2006.

ISSUES¹

1. Did the District provide Student with a free and appropriate public education (FAPE) for the period of January 2005, to the present with respect to the occupational therapy (OT) component of her educational program?
 2. Did the District implement Student's OT program for the period of January 2005, to present in accordance with her individualized education program (IEP)?
 3. Did the District propose appropriate goals and objectives for Student's OT services for the 2005- 2006 school year?
 4. Is the OT program developed by Sandy Fitzpatrick appropriate for Student?
 5. Is Student's Mother entitled to reimbursement for the following:
 - a. The OT assessment by Sandy Fitzpatrick?
 - b. The OT services provided by Sandy Fitzpatrick?
 6. Is Student entitled to compensatory OT education of a minimum of 30 one-hour OT sessions to be provided to her until the end of 2006 in her home environment?
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¹ On February 24, 2006, Petitioner filed a document entitled "Amended Issues and Proposed Resolution". This complaint added a tenth issue in controversy between the parties. However, the Order Setting Due Process Hearing, issued by OAH on February 1, 2006, specified that the hearing issues were those defined in Petitioner's Amended Issues and Proposed Resolution, dated January 16, 2006. Indeed, Petitioner's Exhibit 2, "Hearing Issues", is a copy of the complaint dated January 16, 2006. Since the February 24, 2006 amendment was never put at issue at the Trial Setting Conference, because it partially encompasses a time frame beyond the applicable three-year statute of limitations, and because Counsel for Respondent asserted she had not seen the amendment and was not prepared to respond to it, Petitioner decided to withdraw the allegations of the amendment for purposes of this hearing. Should she so choose, Petitioner may file another complaint addressing the additional causes of action.

7. Does Student require two hours of direct OT services at home in order to address all of her unique needs including but not limited to fine motor/self help/feeding/hygiene needs/visual motor skills, etc.?

8. Currently, which agency/OT therapist is the appropriate OT provider for Student: the provider selected by the District or the one selected by the Student?

9. Is "regular education" or "regular education with supplementary aids and services" the appropriate designation for Student's educational placement?

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student is a young lady who will reach her thirteenth birthday on June 15, 2006. She is presently enrolled in the sixth grade at Brywood Elementary School, a public day school in the Irvine Unified School District. Student was born with cerebral palsy which physically limits her ability to access her curriculum at school. Cerebral palsy is classified as an orthopedic impairment for purposes of Student's eligibility for special education. There is no dispute that Student is eligible for special education services in the general sense; nor is there any dispute that the District is required to provide *some* form of occupational therapy as related services to Student. Rather, the dispute in this case focuses on the *extent* and *type* of occupational therapy services that the District should provide to Student under the Individuals with Disabilities Education Act (IDEA) and whether the District has met its legal obligations in that regard. To condense the arguments, the Student urges that she requires direct OT services that address all facets of her life at school, including eating, dressing/undressing, toileting, and development of fine motor skills to help in her writing and keyboarding. The District argues that it is only required to provide "educationally-based" OT services that assist Student in accessing her curriculum at school. The District also asserts that "Special Day Class with collaboration and consultation in a general education classroom" is the appropriate *designation* of Student's

school placement. Student asserts that her placement should be designated as "Regular" or "General" education. The actual *placement* for Student is not at issue in this case.

2. Cerebral palsy is an umbrella-like term used to describe a group of chronic disorders impairing control of movement that appear in the first few years of life and generally do not worsen over time. Symptoms of cerebral palsy include difficulty with fine motor tasks (such as writing or using scissors), difficulty maintaining balance or walking, and involuntary movements. The symptoms differ from person to person and may change over time. Some people with cerebral palsy are also affected by other medical disorders, including seizures or mental impairment. Although its symptoms may change over time, cerebral palsy by definition is not progressive. At this time, cerebral palsy cannot be cured, but patients can use a variety of means to assist them in their day-to-day living needs. For example, special braces can compensate for muscle imbalance, mechanical aids can be used to help overcome impairments, and physical, occupational, speech, and behavioral therapy may be employed.

3. Student first was placed in special education programs on June 15, 1998, when she turned five years old. At the time she was repeating second grade in 2001, Student's placement was described as a Special Day Class (SDC) located in a General Education Class with collaboration and consultation ongoing between the different instructors. Student was provided with a one-to-one aide to monitor her physical needs. Designated Instruction and Services provided were adaptive physical education, individual and small group instruction, language and speech therapy, mental health services through Orange County, and physical therapy (PT) and occupational therapy (OT) through the Reilly Clinic, which either was a part of, or contracted by, California Children's Services (CCS). It appears that all PT and OT services at this time were being provided through CCS. Using a word processor to complete class assignments was one of Student's goals and objectives. Student spent 98 percent of her school day in Special Education. No specific PT

or OT goals or objectives were submitted as evidence along with the IEP of this date. Mother accepted the goals and objectives as written.²

THE IEP OF NOVEMBER, 2002 AND SUPPORTING ASSESSMENTS

4. Student's IEP team meeting for third grade was first held on November 21, 2002.³ The team noted Student's deficits in motor development and self-help, especially that Student still needed help with toileting and with eating anything other than finger foods. Notably, the IEP indicated that Student still needed the help of her assistant to "function in the school environment." Typing words independently with her word processor continued to be one of Student's goals and objectives. Her school placement continued to be described as SDC in a general education class with collaboration and consultation. Student's one-to-one aide was described as providing her with physical assistance in moving around the school campus and within the classroom, with toileting, eating, hygiene, transfer from Student's wheelchair to her walker or stander, page turning, and writing, and included using her finger to track while Student was reading, as well as with facilitation of interaction with Student's peers throughout the day and recess. As it pertains to this hearing, the most significant modifications from the previous year's IEP

² This IEP, as do all IEPs referenced in this Decision, covers many other areas of Student's special education needs. However, those areas were not put at issue by Student in this due process hearing and will therefore not be addressed.

³ On November 15, 2002, CCS prepared a consultation summary regarding OT and PT services CCS was providing to Student, most likely in preparation for this IEP. The summary notes that Student had been provided with a Mulholland prone stander, a Rifton Pacer Walker, required assistance of an aide to transfer to the toilet, could eat finger foods and drink liquids from a cup with a straw. The summary noted that Student's aide generally had to feed her to meet the time restraints of the school lunch hour.

were: a) the time Student was to spend in Special Education during her school day was decreased by more than half to 46 percent; and b) OT services at the Reilly clinic were decreased to four times a year with consultation as needed. Basically, OT direct services were discontinued.

5. Mother did not agree to the recommendations in the IEP of November 21, 2002, until February 28, 2003, after changes had been made to address her concerns. Mother had apparently also expressed concern about how Student's school placement was designated, taking issue with the description as a "Special Day Class" rather than a "Regular Education Class." In response to her concerns, two Support Specialists from the District wrote to Mother explaining the changes made in the IEP. They also explained the District's position that "SDC" is a *term* that shows how much special assistance a student needs to be successful. Student now needed assistance during 46 percent of her school day. They further explained that the *place* all students received their education was in a regular classroom. Therefore, Student was receiving SDC services 46 percent of the time but was assigned to a regular classroom. Mother continued to take issue with the District's definition, asserting that an SDC was a *place*, a physical location.

6. An interim IEP meeting was held for Student on May 27, 2003. This IEP, along with a consultation summary from CCS of the same date, clarified a few issues with regard to services Student had been receiving. CCS was present at this IEP as it had been at the IEP held the previous November. The CCS consultation indicates that Student had been receiving PT services two times a week from CCS from age one until November of 2001. At the interim IEP, CCS discussed with Mother and the IEP team that it was its position that Student's acquisition of skills had reached a plateau in 2001 which was why she was placed on a consultative level with CCS at that time. The IEP team, with consultation from CCS, discussed Student's increased use of her power wheelchair at school, increased use of her stander and of her walker. Both CCS and the IEP notes

indicate that OT services were being provided on a consultative basis by CCS at the rate of six times a year *or as requested by the school*.

7. Mother wrote a letter to the District on June 1, 2003, voicing numerous disagreements with the language of the interim IEP. Mother specifically stated that she felt Student needed direct PT and OT services, not just consultations as indicated by CCS.

With regard to the consultations being provided by CCS, Mother requested that more information be provided regarding the specifics of the consultation services. At some point, Mother agreed to the IEP formulated at the IEP meeting held May 27, 2003, but with reservations. An addendum, which Mother signed, is dated November 21, 2003.

8. In a letter confirming the next IEP meeting, the District confirmed that all PT and OT service recommendations were being determined by CCS. Therefore, any questions Mother had regarding PT or OT needed to be directed to it.

THE OCTOBER 2003 IEP AND SUPPORTING ASSESSMENTS

9. The October 28, 2003 IEP meeting became a long, drawn-out process which was not concluded until many months later. During this process, two due process complaints were filed by Student against the District, one of which requested the District provide Student with direct OT services and reimbursement for her Parent's cost of independent assessments and privately-provided OT services. The District also filed a due process complaint requesting a hearing to determine its right to assess Student.

Ultimately, two settlement agreements were reached between Student and the District through mediation which purported to resolve all pending complaints. The settlement concerning OT resulted in the provision of OT services which were paid for by the District and which underscores the disputes at issue in the present due process hearing.

10. Mother was provided with an Assistive Technology assessment for Student which noted that Student's writing progress was slow. Although her verbalization of thoughts was good, Student was finding it difficult to translate those thoughts into writing. The assessment noted that Student was provided with an extensive array of technology to

support her academic program. These items included: IntelliKeys, to assist her in typing on the computer; IntelliTalk II, a word processor that combines speech, graphics and text so that text can be read back; Overlay Maker, a software program that works in conjunction with the IntelliKeys keyboard; Math Pad, an electronic number processor that allows for generation of math worksheets; IntelliMathics, for support of Student's math curriculum; WYNN, a software program that scans printed materials and then can read back the text using synthesized speech. To support the WYNN program, Student was also provided with a Windows 2000 desktop computer, a color scanner, a printer, and a computer cart. Student was also given an adapted trackball mouse, her written school work was enlarged for easier reading, and she was provided with a slant board when using paper and pencil to write. The assessment stated that Student's needs were being met. The only further recommendations were for an adapted tape recorder so Student could dictate written assignments, a clamp for worksheets, an upgrade for a Co:Writer program previously used by Student, and additional mathematics software.

11. The original IEP dated October 28, 2003 was very similar to the previous year's IEP. With regard to her written expression skills, the October 28, 2003 IEP noted, as had the previous year's IEP, that Student was not fully accurate in typing two and three syllable words and that she was not consistently proof-reading her work. The proposed goals and objectives were for Student to reach 90 percent accuracy in typing two-syllable words on dictation, with Student re-reading her work in order to self-correct it. Although accuracy was measured, no indications of the time in which Student was to complete typing two words was noted.

12. Student's educational placement was again described as a Special Day Class delivered collaboratively in a general education classroom. The October 28, 2003, IEP neglected to specify the percentage of time that Student would be receiving Special Education services. However, the IEP does specify that for her academic curriculum, Student was to be fully integrated (with non-disabled students) except for 120 minutes a

week of one-on-one math instruction. Student was also to be fully integrated for recess, music, art, field trips and lunch, with the exception of two thirty-minute Adaptive PE sessions per week. The services to be provided by Student's one-to-one aide were much the same as indicated in the previous year's IEP. Mother did not sign the proposed IEP on October 28, 2003.

13. Further IEP meetings were scheduled to discuss the assessments that had been completed for Student. An IEP addendum dated October 29, 2003, notes that CCS was still recommending PT consultations. Also noted was the fact that CCS was not providing direct services and that they would pay for equipment Student needed at home *but not for school equipment* (emphasis added). Rather, CCS would consult with the District regarding equipment Student might need at school. Discussed as well was CCS's determination that Student's skills had reached a plateau. There is no indication of the specific type of skills that allegedly had reached this plateau or how this determination was made.

14. Student's OT was also discussed on October 29, 2003. The OT therapist from CCS noted that Student still needed assistance with feeding and dressing. The CCS representative recommended, again, that OT consultation be given to Student four times a year or as needed. There was also a discussion as to Student's OT needs as they related to her educational needs and success at school. At this meeting, Mother requested direct OT services for Student and stated that she would be obtaining an independent OT assessment as well. The meeting ended without an agreed-upon IEP; future IEP meetings were scheduled.

15. A further IEP meeting was held on November 13, 2003. The focus of the meeting was on Assistive Technology (AT) and reviewing the academic assessment. Mother, through her advocate, requested voice-recognition software for Student as well as more portable technology, such as a notebook computer. The District representatives stated that the technology of voice recognition software was not sufficiently developed at

that time and was therefore not appropriate for Student. The District AT specialist also noted that she felt the technology already in place was sufficient for Student to reach her goals and expectations. It appears that nothing was resolved at this meeting.

16. A reconvened IEP meeting was held on November 24, 2003. One of Student's teachers noted that Student's drooling had increased; the daily use of an electric toothbrush was recommended to stimulate Student's gums, cheeks, lips and nerve endings. PT services were discussed and agreed to be provided. Significantly, Mother refused to consent to the District's proposed OT assessment until she had more information about where the assessment would take place.

BETHZAIDA FIGUEROA'S OT ASSESSMENT

17. Prior to the reconvened IEP meeting, Mother contracted with Bethzaida Figueroa, a private pediatric Occupational Therapist (OTR), for completion of an OT assessment for Student. The purpose of the assessment, prepared on December 5 and 6, 2003, was to determine Student's then-current levels of function in the areas of fine motor, self-help, and sensory processing. The OTR used the Peabody Developmental Scales (PDMS-2), fine motor subtest, the Pediatric Evaluation of Disability Inventory (PEDI), the sensory Profile/Caregiver Questionnaire, the Debra Beckman Oral Motor Protocol, and clinical observations and parental interview.

18. The OTR noted that Student presented with fluctuating muscle tone throughout her trunk and upper and lower extremities. She noted that Student's strength was greater on her left side than on her right. Although Student could roll in a supine position, she needed maximum support to assume a position on all fours. She was not able to transfer from all fours to her wheelchair. In her wheelchair, Student had poor postural control and she positioned her shoulders for purposes of stabilization. The OTR noted that Student's left hand was dominant and she also neglected her right hand and arm. This made bilateral asymmetrical coordinated tasks (those between both hands/arms)

difficult and time-consuming. Limited range of motion and lack of strength in her right upper extremities was also noted.

19. The OTR noted significant deficits in Student's fine motor and perceptual skills, particularly in her ability to grasp objects, such as a pencil. It took Student three minutes to write her four-letter first name. Her writing was large, had poor letter formation, and Student could not stabilize her paper while writing. She relied on her left extremities to complete tasks such as writing and could not manipulate items coordinating between her two arms or hands. Visual tracking deficits were noted. Although Student could string large beads with plastic tubing, she was unable to cut a line or circle with a pair of scissors or to manipulate fasteners. Student's sensory processing was also noted as being significantly deficient.

20. The OTR stated that Student demonstrated decreased muscle tone throughout her oral-facial area as well as decreased tactile sensory awareness and poor lip strength. The latter resulted in poor saliva management. Also noted were deficits in chewing ability. Because of her poor power bite, Student would tug and pull on foods to separate them. When unable to bite down on her food, Student would overstuff her mouth and swallow foods whole. Student had difficulty eating with a spoon and fork and could not use a knife to cut her food. She could drink liquids with a straw; using an open cup was difficult and resulted in spills. Student told the OTR that she was often fed by her aide at school due to time restraints. Also noted was Student's need for maximum assistance for transfer to a toilet, to a tub, and to her wheelchair. In summary, the OTR found that Student's oral-motor/feeding and self-help delays could affect Student's safety and self-esteem. The OTR recommended that Student receive OT services twice a week for at least six months to address Student's noted deficits.⁴

⁴ Mother contracted with another OT therapist for a second opinion in anticipation of Student's then-pending due process hearing. This second private OT assessment, dated

THE RECONVENED IEP MEETING AND THE DISTRICT'S OT ASSESSMENT

21. A reconvened IEP meeting was held on January 29, 2004.⁵ Changes from the original IEP dated October 28, 2003, included the designation of the general education teacher in addition to the SDC teacher for implementation of many of Student's academic objectives and the addition of handwriting goals and objectives. Mother voiced her confusion regarding Student's daily participation in the general education classroom. Mother brought an interpreter to this meeting. Through the interpreter, the District again explained its position that the SDC designation was appropriate because Student was receiving more than 50 percent special education support in the general education classroom. The Occupational Therapist contracted by Mother presented her findings along with her proposed goals. She indicated that she had been working with Student two times a week at home for over a month. The District's representatives agreed to consider the private OT report, but stated that they would not consider the OT recommendations without a District-generated OT assessment. The meeting adjourned without much progress being made on finalizing this IEP.

April 4, 2004, is in substantial agreement with the first assessment done in December of 2003.

⁵ The amended IEP for that meeting was inadvertently dated 1/29/03 rather than 1/29/04.

22. The due process complaint filed by the District and one of the complaints filed by Student were consolidated and mediated by the parties.⁶ A settlement agreement was signed on February 26, 2004. It contained three provisions pertinent to the instant due process proceedings. First, it was agreed that Student would remain at her elementary school in a regular education class with SDC support until her next annual IEP review, which was to be held on or before January 29, 2005. Second, Mother, in the spirit of compromise, agreed to consent to the recommendations of the January 29, 2004 IEP. Third, Mother also agreed to meet in March to discuss the recommendations of the OT therapist contracted by the District.

23. A further IEP meeting was held on March 23, 2004, to discuss the completed OT assessment requested by the District and administered by OTR Janette Morey of Orange County Therapy Services. Although the deficits noted for Student are substantially similar to those noted in the OT assessment done by Ms. Figueroa in December of 2003, Ms Morey was more positive about Student's ability to eat functionally and safely in the school environment. Ms. Morey emphasized the numerous modifications and adaptations that had been made to Student's classroom and environment, concluding that Student's progress in the classroom was dependent on these adaptations and modifications. Ms. Morey stated that from an educational standpoint, Student only required OT on a consultative basis once a month to further Student's independence and success in the classroom. Ms. Morey's conclusion was that further progress in Student's neuromuscular development was guarded due to Student's severe cerebral palsy.

⁶ Student filed requests for due process complaints that were numbered SN03-02627 and SN03-02684, alleging that the District failed to assess Student as to her need for OT services and failed to provide necessary OT services. The District filed complaint SN04-0656 requesting a decision as to whether the District had a right to perform an OT assessment of Student.

MEDIATED SETTLEMENT OF THE PRIOR DUE PROCESS COMPLAINTS

24. Mother did not agree with Ms. Morey's report or recommendation and filed another due process complaint requesting District funding for the private assessment and OT services she had obtained for Student. The parties settled this complaint on April 20, 2004. The District agreed to reimburse Mother for the cost of the OT assessment and services completed by Ms. Figueroa to the date of the agreement. The District also agreed to fund OT services for Student from the date of the agreement through January 29, 2005, the date set for Student's next annual IEP team meeting. Services were to be provided by Ms. Figueroa two hours per week, one hour of home-based OT and one hour of school-based OT. The District agreed to a consulting contract with Ms. Figueroa even though she was not licensed as a Non-Public Agency, in the spirit of compromise. The settlement agreement *does not* address how the agreement to provide OT services impacts stay-put provisions for Student and does not address the consequences of the failure of the parties to agree to an IEP the following January, particularly as to how that would affect OT services being provided. With this settlement, it appears that full agreement was reached as to the IEP dated January 29, 2004. This also appears to be the last fully-agreed upon IEP for student as of the date of the hearing in the instant case.

THE NOVEMBER 2004 IEP AND MS. FIGUEROA'S OT PROGRESS REPORT

25. An interim IEP team meeting was held on November 30, 2004. At that time, Ms. Figueroa informed the team that she was moving out of state within the next two weeks and thus would no longer be able to provide OT services to Student. The District agreed to provide Mother with a list of other OT providers so that it would continue to abide by the April 20, 2004, settlement agreement. Mother requested that the OT services be provided beyond the January 29, 2005, date stated in the agreement. The District did not acquiesce to the request at that time although the District later acknowledged that it

was obligated to continue to provide OT services after January 29, 2005, while IEP discussions were on- going.

26. At this meeting, Ms. Figueroa also discussed the OT progress report she had completed for Student. The progress report addressed five areas: postural control, fine motor skills, self-help skills, oral-motor/feeding skills, and sensory processing. The progress report defined the goals as annual and gave objectives, or benchmarks, for Student to meet by September 3, 2004, December 3, 2004, March 3, 2005 and June 3, 2005.

27. With regard to postural control, the report noted that Student was making significant progress and could now maintain a sitting position for 30 to 60 minutes and could transfer from a sitting position on the floor to her wheelchair with tactile cues and verbal prompting. Student continued to neglect the right side of her body. Ms. Figueroa defined the annual goal for postural control as demonstrating improvement in "upright body posture and head control while performing table top activities including eating for maximal functional independence and safety." Student's objectives were defined by how long she could bear weight on her right forearm before shifting her weight to the left and how long she could maintain her head at a 75 degree angle with first moderate then minimal assistance. As of November 4, 2004, Student had met the objective for December 3, 2005.

28. The annual goal for fine motor skills was defined as improving "functional shoulder, arm, and hand control for greater success and independence with fine motor task and classroom manipulative." There are three subsets of objectives. The first addresses Student's ability to use a static tripod grasp upon a writing utensil, while stabilizing paper with her right arm. The second addresses Student's ability to write her name within 2.5 minutes with the use of a suction dowel in a certain number of trials. The third addresses Student's ability to learn her keyboarding letter positions. As of November

4, 2004, Student had met the goals of all three subsets of fine motor tasks for December 3, 2004.

29. Ms. Figueroa defined the Student's annual goal for oral-motor skills as increasing "jaw strength necessary for eating (masticating food safely.)" The objectives were defined in terms of how many repetitions Student would chew on a Nuk toothbrush and on crunchy foods on each side of her jaw. As of November 4, 2005, Student had only met the first objective for September 3, 2005.

30. A second oral-motor skill was defined as demonstrating "improved independence in managing her foods successfully and safely, (without swallowing foods whole) at school and home environment." Ms. Figueroa defined the objectives by how many trials it would take Student to bite through crunchy foods with minimal assistance. As of November 4, 2004, Student had met the goals established through December 3, 2004.

31. There were two feeding goals defined by Ms. Figueroa in her progress report. For the first, to demonstrate improved functional independence with eating, Student was to learn to use a rocker knife to cut solid, soft-textured foods, such as a sandwich. Student could never perform the goal due to the fact that a rocker knife was not made available. For the second goal, Student was to "demonstrate increased grading arm/hand movement when drinking thicken (sic) liquids from an open cup with minimal assistance and minimum spills." As of November 4, 2004, Student had not met any of the benchmarks for this annual goal.

32. Another annual goal was given in the area of self-help, to be accomplished by two different objectives. In the first, Student was to "demonstrate improved independence and self-accomplishment with dressing and hygiene/grooming skills" by removing a front blouse or jacket in a progressive amount of trials. In the second, Student was to be able to remove a three-fourths inch button with moderate assistance in a

progressive amount of trials. By November 4, 2004, Student had met both goals set for December 3, 2004.

33. In concluding, Ms. Figueroa found that Student had made significant progress in the skills defined for her annual OT goals and objectives. However, Ms. Figueroa noted that Student still needed to improve her body positioning, awareness of her body in space, and postural control in both sitting and standing positions. Student also needed to work on coordination and strength in her upper extremities as well as on her visual perceptual skills and on improving her self-help and oral-motor/feeding skills. Ms. Figueroa recommended that Student continue to receive OT services twice a week (but solely at home, not at school) for the next calendar year in order to preserve Student's self-worth among her peers and teachers. Also recommended was OT consultative services to provide caregiver education and follow through with the learned skills at school.

THE IEP MEETING OF JANUARY 2005 AND THE RESULTS OF THE CHANGE IN OT PROVIDER

34. The departure of Ms. Figueroa resulted in disputes arising between Student's Mother and the District with regard to the provision of OT services for Student. Those disputes ultimately led to the filing of the instant due process complaint by Student.

35. As agreed to in the settlement agreement dated February 26, 2004, Student's annual IEP was held on January 25, 2005. This IEP was continued many times. As of the date of the due process hearing in this matter (March 8 through 14, 2006) Mother had not fully agreed to the IEP first proposed on January 25, 2005.

36. By the time the IEP team meeting was held on January 25, 2005, the District had contracted with another OT provider, Wertheimer-Gale and Associates, to provide OT services for Student. Diane Wertheimer-Gale was present at this IEP meeting. There was discussion at the meeting about problems Student was encountering at school with mobility and about her oral hygiene needs. Both Ms. Gale and CCS indicated they were willing to work with Student on the oral hygiene and work with Mother so that she too

could assist Student in meeting a goal of independently brushing her teeth. Also discussed was the fact that Student's keyboarding skills were not functional yet since it was very laborious for her to type. It was agreed that the OT and AT specialists would collaborate to determine Student's keyboarding needs. The issue of alternate computer access was apparently touched upon as well. No resolution of the IEP was reached.

37. The January 29, 2005 annual IEP was reconvened on February 24, 2005. At this meeting, Student's PT therapist, Mark Klem, reviewed his PT report. It is unclear how much PT service Student was receiving at that time. As of the date of the hearing in this case, Mr. Klem was providing Student, through a consultation agreement with the District, with direct PT services twice a week, one hour at home and one hour at school. He works through a provider called Function Junction. Mr. Klem has a Bachelor of Science degree in Physical Therapy from California State University, Long Beach. He has been working at his profession for fifteen years and specializes in pediatric therapy. During his career, he has taken many continuing education courses, including an eight-week course dedicated to the treatment of patients with cerebral palsy.

38. Mr. Klem's PT report dated January 25, 2005, gave his proposed annual goals and objectives for Student for the following year. There were seven levels of performance listed with corresponding goals and objectives. Mr. Klem's format resembled the one used by OTR Figueroa. His areas also appeared to cross-over those covered by the OTR as well. Mr. Klem's PT program, including annual goals and objectives, as well as his testimony at hearing, emphasized his position that Student has the ability to strengthen her muscles and increase her stamina and thus progress physically in all areas of gross and fine motor skills.

39. The IEP team meeting on February 24, 2005 also included a discussion between Mr. Klem and the District's AT specialist about the possibility of Student using a head mouse to assist keyboarding. The team also commented that they would determine Student's technology needs at school and at home based upon her goals and objectives. It

was also noted that the OTR, the AT specialist and the Vision specialist had all met with Student to consult and to co-treat her in order to address Student's needs. The IEP indicates that Student would be spending a total of 40 percent of her day in Special Education. Her placement was again described as being in a Special Day Class delivered collaboratively in a general education class. PT and OT were indicated on a consultative basis by CCS. PT services were also specified as being provided by Mr. Klem two times a week at the school campus. OT services were indicated for one sixty-minute session of individual therapy at home and one sixty-minute session of individual therapy at school, to be provided by Wertheimer-Gale & Associates (WGA), through Ms. Gale or her employee Debbie Hyman. No specific OT or PT goals and objectives appear to have been formulated for this IEP other than what Ms. Gale defined as "written expression" goals.

40. Ms. Gale, the new OT therapist, participated in the IEP meetings starting in January of 2005. Ms. Gale has been practicing for over 19 years. She has a Bachelor of Science degree from Wayne State University and has an Masters in Business Administration pending through the University of California at Irvine. Her Company, WGA, employs five additional therapists and is licensed as a Non-Public Agency (NPA) by the State of California. She has had considerable continuing education in a variety of OT areas. One of her areas of concentration was oral-motor feeding and functioning. She has worked both in hospital and school settings before setting up her own practice, which primarily deals with pediatric occupational therapy. Over the years, Ms. Gale believes she has treated over 85 students who had a diagnosis of cerebral palsy. It was she who suggested the written communication goals in Student's IEP, started on January 25, 2005 and continued on February 24, 2005 and March 10, 2005.

41. In her Occupational Therapy Update Report for the IEP meeting, Ms. Gale stated that Student had been seen for services by WGA a total of two times, once at home and once in school. She noted that the focus of the services had been on written communication, self-care, and equipment needs for Student's school environment. She

further noted that Student was working on keyboarding skills with the OT and the AT. She noted also that Student was only typing 3 words every 20 minutes and only used her left index finger to type. Ms. Gale noted that consultation was being provided to Student's Mother and other staff so that they could work on facilitating Student's level of independence by adapting her environment to her needs. Ms. Gale stated that her plan was to continue services as stated with an added goal for keyboarding.

42. Ms. Gale addressed keyboarding as a proposed goal in the IEP meeting held February 24, 2005. Handwritten in the IEP for that date is a Present Level of Educational Performance defined as "Written Communication." Ms. Gale noted that Student was taking 20 minutes to type 3 words and did not know the positions of the keys without visually scanning them. She defined the goal for Student as increasing her level of independence with an adaptive keyboard. By February 24, 2006, the goal for Student was to be able to complete a 5 to 7 word sentence in ten minutes in four out of five trials. Benchmarks were given at somewhat irregular intervals (for March 25, 2005, June 23, 2005, December 15, 2005, and the annual goal for February 24, 2006). The proposed goals were to be implemented by the OT, Student's teacher and parent, and other school paraprofessionals.

43. The IEP meeting was continued until March 10, 2005. Ms. Gale attended the meeting. She reported that she had evaluated Student's feeding during lunch time at school. She noted that Student was able to open some containers with a fork punch and had independent hand to mouth movements that permitted her to feed herself with her fingers, a plastic fork and adapted silverware. Ms. Gale noted that Student did need some help with the set up of the school lunch. Student was observed having complete lip closure, sucking and swallowing capabilities and rotary chewing. Ms. Gale felt that opening containers did not need to be worked on as a goal since allowing extra time for Student to eat was a modification that the school can, and does, provide. Ms. Gale noted that the main key was to allow enough time for Student to eat. She felt Student was completely

functional, meaning she completed her meals adequately 90 percent of the time. Ms. Gale would continue working with Student on her grasping abilities. She also noted that CSS would continue to work with Student on independent living skills such as buttoning her blouse. No further OT goals or objectives were discussed. Neither were any of the additional AT devices that had been proposed at previous meetings. Mother had many requests and voiced concerns at this meeting. She did not consent to the IEP. In a follow-up letter to Mother, dated March 29, 2005, the District responded to some of her concerns. OT was not addressed in the letter.

44. There was some communication between Mother and the District after the March 10, 2005 IEP meeting. In a letter to the District dated June 2, 2005, Mother agreed to several components of the IEP, specifically, the Adaptive PE program, the Vision Services, the PT program, the orientation and mobility services and program, the Special Circumstances Assistant (one-to-one aide), and ESY services per a previously mediated agreement. As to OT, Mother agreed to the provision of OT services for the proposed sixty minutes a week at home and sixty minutes a week a school. However, she did *not* agree to OT services being provided by Ms. Gale or to the one goal (of keyboarding) that was proposed. Mother also disagreed with the designation of Student's placement as "SDC." Mother pointed out that the settlement agreement of February 26, 2004 stated Student would be placed in a regular education class with SDC support. Her position was that the new IEP changed that placement or designation.

45. Following the March 10, 2005 IEP meeting, the relationship between WGA and Student and her Mother deteriorated. Mother and Student had been very happy with the OT services, goals and objectives that had previously been provided by OTR Bethzaida Figueroa. At some point after the March 10, 2005 meeting, Student laboriously typed a short letter to her Mother stating that she was not happy with the services provided by Ms. Gale. Student stated that she felt Ms. Gale was not teaching her much and that she was asking too many questions that were not related to OT. Mother apparently gave a

copy of the letter to District representatives and ultimately requested that another OT therapist be provided in order to honor Student's wishes. Mother specifically requested that one of the two OTRs who she had previously hired to privately assess Student be contracted by the District to provide the OT services to Student. The District declined the request. At hearing, the District's position was that, although they had previously agreed to use OTR Figueroa pursuant to a settlement agreement with Student, she had not been a state-certified NPA . The OTRs suggested by Mother were also not certified. The District preferred to use providers who had gone through the state certification process to assure their competence. The District informed Mother that it believed that WGA was providing a high level of OT services to Student. However, based upon Student's letter, WGA substituted therapist Deborah Hyman, who provided OT services to Student at school, in place of Ms. Gale to provide OT services to Student at her home.

46. Mother's dispute with WGA continues to center on the changes in the way OT services were being provided and the focus of those services, particularly at home. Ms. Figueroa had specific goals and objectives, as stated above, which she worked on with Student directly in the home environment, which were designed to increase Student's strength, postural control, fine motor skills focusing on grasping and writing ability, self-help, and oral-motor/feeding skills. Ms. Gale instead focused on having Student independently brush her teeth, brush her hair, eat with utensils, open and close a door at home, and transfer to the toilet. Ms. Gale also used a more consultative model rather than a direct services model with Student at home. That is, instead of working directly with Student, Ms. Gale focused on teaching Mother the skills that Student was to work on so that Mother could, in turn, work consistently with Student during the course of each week.

47. Although Ms. Hyman was substituted for Ms. Gale as the in-home OT provider, Mother was still not happy with the services. She felt that Ms. Hyman, as an employee of WGA, would merely continue the program developed by Ms. Gale. Mother therefore decided not to accept any home-based OT services at all as long as the District

insisted that the services be provided by WGA. As of approximately June 2005, Mother would not permit the WGA OT to enter the home. Ms. Hyman continued to show up for her scheduled appointment every week even though her knock was not answered. The District finally informed Mother on December 1, 2005, that the therapist would no longer go to the home until Mother informed the District that Student would be made available for the services.

THE IEP MEETING OF NOVEMBER 29, 2005, AND SANDY FITZPATRICK'S ASSESSMENT

48. Other than an IEP meeting to discuss summer services for summer, 2005, no IEP meeting was again held with regard to Student until November 29, 2005, although Student continued to receive her related services and continued with her education programs at school. At this meeting, Mother reiterated that Student did not want to continue with WGA since she had stopped learning any skills. The dispute between Mother and WGA was addressed directly at this meeting. WGA believes that the OT goals developed by Bethzaida Figueroa, which had been implemented pursuant to the April 20, 2004 settlement agreement, were not educationally based and were not designed to specifically support Student in accessing her curriculum. WGA again proposed specific keyboarding goals for Student, updating the goals and benchmarks. The goals were noted in a written report from OT Deborah Hyman who noted that Student was, by November 28, 2005, able to type at a speed of approximately 14 words in five minutes, 10 seconds (less than three words a minute.) By January of 2006, this IEP described Student's placement as being in Special Day Class only forty percent of the time.

49. Mother again expressed her disagreement with the WGA OT services. She informed the IEP team that she intended to contract for a private OT assessment for Student and for private OT services, and then seek to have them reimbursed by the District. She agreed to provide a copy of the assessment to the District. Mother did not specifically request the District to perform an OT assessment of Student. However, the District also indicated that it intended to have Student assessed by its own Occupational

Therapist; apparently, the District had recently hired an in-house therapist which had not been the case when the issue of OT was first mediated with Student in early 2004. Mother still voiced her intent to obtain a private assessment.

50. By letter dated December 1, 2005, the District confirmed in writing that they were denying Student's request for District funding of Student's private OT assessment and services. The District confirmed its intention to comply with the settlement agreement regarding OT services and would continue to provide the services to Student at school and at home, should Student be made available to the therapist.

51. Mother contracted with Sandy Fitzpatrick of OT 4 Kids to complete an OT assessment of Student. Ms. Fitzpatrick has a B.S. degree in Occupational Therapy. She has worked as an OT for twelve years and is registered and licensed by the State of California. She has specialized in pediatric OT for the last seven years. She is employed by the Orange County Department of Education as well as being self-employed. She serves clients ages four through twenty through contracts with a number of school districts, including respondent Irvine Unified School District, although she is not certified as an NPA or Non-Public School through the state. Ms. Fitzpatrick provides services to students based upon their IEPs and then bills the school districts on a monthly basis. The assessment was done in December of 2005 at Student's home; Mother refused to permit Ms. Fitzpatrick to assess Student at school. The lack of a school-based portion of the assessment prevented Ms. Fitzpatrick's assessment from being a complete picture of Student's present level of performance in the areas of occupational therapy.

52. Although incomplete, the OT assessment done by Ms. Fitzpatrick is the most recent description of Student's physical status and capabilities as influenced by Student's cerebral palsy. Ms. Fitzpatrick evaluated Student with regard to her upper extremity strength and capabilities, her fine motor skills, self-help and feeding skills, oral motor skills, and self-help and dressing skills. Deficits were noted in all these areas. Student tends to neglect attempting to use her weak right side of the body and can only

use her left index finger to hunt for letters on the keyboard. She also has difficulty carrying items and often drops them off her chair and then requires assistance in retrieving the item.

53. Ms. Fitzpatrick's evaluation noted that Student also had present difficulty in feeding herself. When using her fingers (such as when picking up pieces of food), Student generally used her left thumb, index finger, and middle finger. She had to put most of the length of her fingers into her mouth in order to position the food accurately so that she could eat it. Student often spilled food as her fingers were going into and then out of her mouth. The process could be messy and unsightly. Her ability to use a fork was not fully-developed as she tended to turn the fork over when raising it to her mouth. Student's aide at school had to assist her in cutting food and often in feeding her to meet the time constraints of the school lunch time. Student also had difficulty drinking liquids. She used a straw as she did not have the strength to bring the cup to her mouth and therefore had to bring her head to the cup, even when using a straw.

54. As to Student's oral motor skills, Ms. Fitzpatrick's evaluation found her mouth muscles were weak; she drooled at times, particularly when talking. It appeared Student had regressed in this area. Student also had a decreased sensory awareness but, at the same time, sensitivity in the oral area. She had a weak bite and decreased chewing skills as a result of which Student preferred to eat soft foods which did not require much chewing. Student could only partially brush her teeth due to her lack of strength. Her present strength only permitted her to brush the front part of her hair as her deficits in range of motion prevented her reaching the back of her head. Student's mother was required to assist Student with brushing both her teeth and hair to properly complete these tasks.

55 Ms. Fitzpatrick's evaluation also noted that Student required maximum assistance in the areas of self-help with dressing and toileting. She needed assistance from another person to transfer herself in and out of her wheelchair and on and off the toilet.

She needed maximum assistance in dressing and undressing herself although Student attempted to assist with her right side (the weaker side of her body) when she could, and was able to roll herself from side to side using the bars on her bed. She was dependent on another person to put on her shoes and socks. She could unsnap clothes on a dressing board but required assistance to snap the clothes and to button and unbutton them when wearing them. Student was totally dependent on assistance for bathing purposes. Additionally, her Mother assisted her during the course of each night in re-positioning herself for the prevention of bedsores. Mother contracted with Ms. Fitzpatrick to provide OT services to Student. However, as of the date of the hearing, Mother had not paid Ms. Fitzpatrick for any of her services.

56. Although the District presented Mother on November 29, 2005, with an assessment plan for the purposes of having Student assessed by the Districts OT therapist, Mother has yet to agree to the assessment. Nor has Mother permitted her own privately-contracted OT therapist to access Student at school for the purposes of completing the private assessment.

57. OTR Deborah Hyman completed an Occupational Therapy Progress Report for Student, dated January 19, 2006, after Mother filed for a due process hearing in this matter. Ms. Hyman is the OTR who was primarily responsible for providing OT services to Student at school. Ms. Hyman was originally licensed as an OT in South Africa after receiving her BS there. She moved to the United States after having practiced in South Africa for seventeen years. She is now licensed in California. Ms. Hyman has taken a vast amount of continuing education classes, both in South Africa and in the United States. She has worked for WGA for three years. In her report, Ms. Hyman notes that she used an ecological model for her report where the child's performance is assessed within the educational environment and the task demands of the curriculum. The educational basis of the model looks to see if Student's difficulties performing in her educational program are

related to issues that may need additional OT service support. The report indicates that Student has met all of the goals proposed in Bethzaida Figueroa's progress report of November 4, 2004, except for the goal for Student to independently cut a sandwich and the goal for Student to remove her own blouse. For both these activities, Ms. Hyman noted that Student still requires maximal assistance.

58. Both Ms. Gale and Ms. Hyman opined that the purpose of Occupational Therapy services in a school-based setting was to assist a student to access her curriculum. They believed the goals on which Ms. Figueroa was working with Student did not assist her in accessing her curriculum. They both felt that Student could feed herself most of the time once her food was set up for her, so there was no reason for the feeding goal. They also believed that the fact that Student might drool when engaged in a task did not interfere with her access to her curriculum, particularly since Student just needed reminders to swallow. Ms. Hyman opined that the motion range goal did not give a degree of assistance or distance as a goal and as such was not measurable. Therefore, Ms. Hyman found that it was also not a functional school goal. Additionally, she felt the goal of bearing weight on particular sides of Student's body did not affect her access to her curriculum.

59. Since Student had met most of the goals proposed by Ms. Figueroa, Ms. Hyman began focusing on Student's keyboarding skills at school. She agreed that Student is not functional in handwriting and that her keyboarding skills need much improvement, which would assist Student in accessing her education. During her OT sessions with Student, Ms. Hyman focused on Student's computer set-up, the font size used, having Student work on location of the letter keys, visual scanning skills and Student's positioning of her body and hands in relation to the keyboard.

60. Since she believes that the school-based mandate for OT is to support the child's access to her curriculum, Ms. Hyman's report included a recommendation that OT services only be continued at school. She feels that home-based therapy is not necessary

to address the goal of ensuring that Student can access her curriculum by improving her keyboarding skills.

FACTUAL CONCLUSIONS

61. All professionals who testified at the hearing demonstrated a strong concern for Student and for her needs. All appeared to be dedicated professionals who are drawn to their professions as therapists by a concern for the needs of children with handicaps and desire to provide assistance to these children. However, it was apparent that the therapists who are contracted by the District owe their loyalties to it and that seemed to influence Ms. Gale's and Ms. Hyman's repetitive testimony that an educational-based model for OT only required emphasis on assisting a student access her curriculum and that curriculum was narrowly defined by a student's academic program alone. Since the District has provided extensive adaptations to the environment for Student, has provided modifications so that she can more easily access her academic work at school, has provided assistive technology to make access easier, and provides a one-to-one aide to assist Student in doing anything she cannot physically do herself, both of the WGA therapists feel that the only thing left for them to work on, as school-based OT therapists, is Student's keyboarding skills.

62. Although Ms. Gale stated that her proposed written expression/OT keyboarding goals for Student had not been implemented since the IEP had never been approved, this was contradicted by Ms. Hyman's testimony that 1) Student had met most of Bethzaida Figueroa's goals by the dates indicated as benchmarks in her report; and 2) since the goals had been met, Ms. Hyman was focusing on Student's keyboarding skills. Since WGA did not believe Ms. Figueroa's goals to be appropriate for an educational setting and since they therefore did not propose a more advanced version of her goals once Student had met the original ones, it is fairly apparent that the only thing left was to work on the proposed goal of the IEP that was never approved by Mother. Additionally, the program that Ms. Gale implemented for Student at home had no present level of

performance, no baseline data and no measurable benchmarks. No progress reports were completed for Student for at least a year - after the due process complaint for this proceeding was filed.

63. Although the WGA therapist disagreed with the original OT goals that were being followed pursuant to April 20, 2004 settlement agreement, the District did not request permission to assess Student for OT until almost a year after Ms. Figueroa's departure as the OT therapist. Although there has not been a fully-agreed upon IEP since approximately April of 2004, the District did not request its own due process hearing, in spite of the many disputes concerning, inter alia, Student's OT services. And, in spite of these many disputes, an IEP meeting was not scheduled to address these issues between March of 2005 and November of 2005, a period of more than eight months.

64. It has been established by a preponderance of the evidence that Student has significant deficits in several areas traditionally addressed by occupational therapy, including aspects of fine motor skills, perceptual motor skills, self-help skills, and sensory processing. It has been established by a preponderance of the evidence that Student needs occupational therapy to assist in the development of her fine motor skills and self-help skills, all of which plainly affect aspects and activities of her school day and her ability to do her homework at home, where no one-to-one aide is provided.

65. California Children's Services only provides occupational therapy based upon a medical model, which requires a doctor's prescription. CCS has already determined that it has met all of Student's "medical" needs. The type of OT provided to Student by Bethzaida Figueroa and Sandy Fitzpatrick is not based upon a medical model. All evidence indicates that Student would derive an educational benefit from OT directed at increasing her ability to use both sides of her body, increasing the strength and grasping ability of her fingers so that she might type better, turn book pages, grasp things better, clean herself in the bathroom, and feed herself better, among other activities that children do at school. Student would also achieve an academic benefit from increasing her strength so

that she can transfer herself from her wheelchair to a toilet or other sitting position. While some of these activities cross-over with normal daily living activities, they are also related to a child's successful attendance at school and interaction with able-bodied peers⁷.

66. The goals and objectives of Student's present IEP with regard to OT services are not sufficiently delineated to allow Student and her Mother to monitor her progress or to address many of Student's deficits noted above. The parties will be directed to return to the IEP process with more specific OT goals and objectives in accord with this decision. However, the District should first conduct its OT assessment as proposed in late December of 2005, to determine Student's present level of performance and to determine her present deficits.

67. Student has not proven that she has regressed due to the change in the focus of the OT services provided to her. Additionally, she chose to eschew the home-based services that the District continued to offer her. Therefore, any deficits in the amount of services provided since January of 2005 is partly due to Student's refusal of some of the services. Even if Student disagreed with the scope of the services, the services obviously would have provided *some* benefit to her, albeit not what she would have gotten from Ms. Figueroa. Therefore, Student is not entitled to compensatory OT services from the District

68. Finally, it is apparent that Student has shown very little progress with her keyboarding. After some five years of working on keyboarding skills, including OT specifically related to keyboarding, Student can only type a maximum of less than three

⁷ It is unclear where the District believes Student should obtain these necessary OT services if not from it or from CSS. There is no indication anywhere in the evidence admitted or in witness testimony that Student has received, or attempted to receive, services from a Regional Center under the Lanterman Act (Welf. & Inst. Code, § 4500 et seq.)

words per minute. It is unknown with what accuracy she is typing even those three words. The IEP team will be directed to consider other available technology that could assist Student in accessing her curriculum, including voice-activated software, a head mouse, laser pens, etc., some of which were earlier considered by the IEP team but never properly pursued.

APPLICABLE LAW

THE GENERAL PRINCIPLES OF IDEA:

1. The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" (20 U.S.C. § 1400(c).)
2. "Free and appropriate public education" means special education and related services that are provided at public expense, that meet the state educational agency's standards, and conform with the student's individualized education program. (20 U.S.C. §1401(8)(A)-(D).) "Special education" is specifically designed instruction, at no cost to the parents to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(25).)
3. The educational agency may be required to provide "related services", denominated as "designated instruction and services" (DIS) in California. This includes developmental, corrective, and supportive services, such as occupational therapy, that may be required in order to assist the student who has a disability to access, or benefit from, his education. (20 U.S.C. § 1401(26); .Ed. Code, § 56363.) As defined by the Code of Federal Regulations, Occupational Therapy is designed to enhance a student's ability to *function* in an educational program, not just to access it. OT services are defined to include "improving, developing, or restoring functions impaired or lost through illness, or

deprivation” and “improving ability to perform tasks for independent functioning if functions are impaired or lost” as well as, “preventing, through early intervention, initial or further impairment or loss of function.” (34 C.F.R § 300.24(b)(5).)

4. Curriculum, as stated in the *Guidelines For Occupational Therapy and Physical Therapy in California Public Schools*, published by the California Department of Education, includes more than just academics. Curriculum includes recess time, lunch time, and a wealth of other activities that occur at school that are not specific to pure academic learning. Using the restroom and eating with one’s peers are aspects of a child’s school curriculum. For example, training a student to toilet properly has been determined to be part of her education at school. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877; see also *Student v. San Marcos Unified School District* (April 27, 2005) SEHO Nos. SN04-01849/02138.)

5. The focus of OT services in a “school model” should be on the OT being part of the classroom to support the student’s *full* participation in school. Outcomes should be created which are relevant to the student’s education including access to the school environment, benefit from classroom learning and life skills. See, for example, *Occupational Therapy Services for Children and Youth Under the IDEA* (Am. Occupational Therapy Association, Second Edition, 1999).

6. (A) In *Board of Education of the Hendricks Hudson Central School District v. Rowley*, (1982) 458 U.S. 176 (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the school district was required to comply with statutory procedures. Second, the IEP was examined to see if it was reasonably calculated to enable the student to receive some educational benefit.

(B) Regarding the nature of the educational benefit to be provided, the Supreme Court made clear that the schools are not required to provide the best possible education; instead, the requirement is to provide a student who suffers from disabilities

with a "basic floor of opportunity." (*Rowley*, 458 U.S. at 207-208.) That being said, that basic opportunity must be more than a de minimus benefit in order that the door of public education is opened for the disabled child in a meaningful way. This is not done if an IEP only affords the opportunity for trivial advancement. (*Walczak v. Florida Union Free School Dist.* (2d. Cir. 1998) 142 F.3d 119, 130.) An appropriate public education under IDEA is one that is likely to produce progress, not regression. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (3rd. Cir. 1997) 118 F.3d 245, 248, cert. den. (1998) 522 U.S. 1047 [118 S.Ct 690, 139 L.Ed.2d 636].)

(C) Under the statutes and the *Rowley* decision, the standard for determining whether the District's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment.

7. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.*, *supra*, 267 F.3d at p. 892.) To constitute a denial of a FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parents' opportunity to participate in the IEP process (*Ibid.*)⁸

8. As the petitioner, Student has the burden of proving that the District has not complied with the IDEA. (*Schaffer v. Weast* (2005) 126 U.S. 528 [_ S.Ct _ , 163 L.Ed.2d 387].)

⁸ A substantially similar standard was codified in the IDEIA. (20 U.S.C. § 1415(f)(3)(E)(ii).)

REQUIREMENTS OF AN IEP

9. An IEP must include in pertinent part a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii), (iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).)

10. Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

11. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁹ "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the

⁹ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), *supra*, 811 F.2d at p. 1314.)

REQUIREMENTS FOR ASSISTIVE TECHNOLOGY DEVICES

12. A school district must provide any AT device that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.308(a); Ed. Code § 56341.1, subd. (b)(5).) An AT device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1).)

REQUIREMENTS FOR AN IEE

13. A parent is entitled to obtain an IEE of a child. (20 U.S.C. § 1415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502(a)(3)(i).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by a school district. (34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).) An IEE obtained at private expense must be considered by the district in any decision concerning a FAPE for the child. (34 C.F.R. § 300.502(c)(1); Ed. Code, § 56329, subd. (c).)

ENTITLEMENT TO REIMBURSEMENT AND/OR COMPENSATORY EDUCATION

14. Parents may be entitled to appropriate relief, including reimbursement for the costs of placement or services that they have independently obtained for their child, when the school district has failed to provide a FAPE and the private placement or services are determined to be proper under the IDEA and are reasonably calculated to provide educational benefit to the child. (*School Committee of the Town of Burlington v.*

Department of Education (1985) 471 U.S. 359, 369 [105 S. Ct. 1996, 85 L.Ed.2d 385];
Student W. v. Puyallup School District (9th Cir. 1994) 31 F. 3d 1489, 1496.)

In *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13 [113 S.Ct. 361, 126 L.Ed.2d 284] the Supreme Court specifically exempted parents from having to meet certain requirements of the IDEA in their unilateral placements. For example, parents are not required to conform their unilateral placement to the content of the student's IEP or provide a placement that is certified by the state. (*Ibid.*) The Court has recognized that the parents' placement does not have to meet a standard as high as a school district's must meet; however, the parents' placement must still meet other requirements of the IDEA, such as providing a placement that addresses the student's needs and provides the student educational benefit. (*Ibid.*)

15. Court decisions subsequent to *Burlington* have also extended relief in the form of compensatory education to students who have been denied a FAPE. (See, e.g., *Lester H. v. K. Gilhool and the Chester Upland School District* (3rd Cir. 1990) 916 F. 2d 865; *Miener v. State of Missouri* (8th Cir. 1986) 800 F.2d 749.) Compensatory education is an equitable remedy. There is no obligation to provide day-for-day or hour-for-hour compensation. "Appropriate relief is relief designed to ensure that the Student is appropriately educated within the meaning of the IDEA." (*Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1497.)

16. Under California Educational Code section 56505.2, subdivision (a), "a hearing officer may not render a decision that results in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified pursuant to Section 56366.1."

PARENTAL PREFERENCES

17. The IDEA does not require that parental preferences be implemented, as long as the IEP is reasonably calculated to provide some educational benefits. (*Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.)

LEGAL CONCLUSIONS

DID THE DISTRICT FAIL TO PROVIDE STUDENT WITH A FAPE FOR THE PERIOD OF JANUARY 2005 TO THE PRESENT WITH RESPECT TO THE OT COMPONENT OF HER EDUCATIONAL PROGRAM?

DID THE DISTRICT IMPLEMENT STUDENT'S OT PROGRAM FOR THE PERIOD OF JANUARY 2005, TO PRESENT IN ACCORDANCE WITH HER IEP?

1. These two issues are intertwined and thus will be analyzed jointly. Both issues are more complex than they appear on the face of the allegations. All parties demonstrated strong sincerity in their positions. Furthermore, neither applicable federal or state statutes nor case law give specific parameters for what exactly constitutes the appropriate amount of Occupational Therapy necessary for a child under the *Rowley* case. However, the ALJ finds that the District deprived Student of a FAPE with regard to the OT component of her special education program by failing to fully implement the agreed-upon program that flowed from the April 20, 2004 settlement agreement between the parties. This finding is based upon Student's physical deficits, progress she has made under previous OT programs, and the assessments done by numerous OT and PT professionals, as described in Factual Findings paragraphs 2 through 5, 14, 16 through 20, 23, 26 through 33, 38, 39, 42, 45 through 48, 52 through 55, and 58 through 68, and Applicable Law paragraphs 1 through 7.

2. While OT was provided, it failed to fully implement the program to which the District agreed by its settlement with Student on April 20, 2004, particularly in the home setting. It is apparent that the new OT providers felt that Bethzaida's OT program was too broad to fit their definition of the education model. It is unclear exactly when the WGA OT providers changed the focus of the program to merely concentrating on Student's keyboarding skills. However, by June, 2005, at the latest, the change had occurred. As OT Ms. Hyman testified, she felt that Student had met all of the goals Ms. Figueroa had written for Student. She then moved to concentrate on keyboarding. If the

District did, in fact, feel that the goals were inappropriate, it should have taken action (perhaps by filing its own due process complaint) to get a legal determination of its position. It did not. Instead, the District merely permitted the OT focus to slowly erode from strengthening Student and making her a bit more independent at school to simply concentrating on keyboarding. And, the program Ms. Gale initiated at home for Student was even less designed to continue the program Ms. Figueroa had implemented.

Unilaterally doing so is a procedural violation of the IDEA which is much more than a de minimus violation in this case. The change deprived Student of the full program she thought she was getting in her settlement agreement of April 20, 2004, which is the last agreed-to parameters for the OT to be provided to Student and which should have been continued by the District.

3. While OTR Morey concluded that Student's neuromuscular development was guarded (and therefore, presumably, could not be enhanced by OT), this conclusion is not substantiated by the evidence. Mark Klem, Student's Physical Therapist, stated both in his assessments and through testimony at hearing that Student had made progress, particularly in the gross motor skills that he specifically treated. Ms. Morey's conclusions also contradict the conclusions of the three other OTRs who have assessed Student (Figueroa, Fitzpatrick and Press) who also believed that Student could meet the goals and objectives they set for Student. Ms. Morey's observation was also later belied by the fact that Student *did* meet the vast majority of the goals and objectives set for her by OTR Figueroa. It is therefore fairly apparent, and the ALJ finds, that Student has at least some further ability to improve her muscle tone and strength. See Factual Findings paragraphs 2 through 5, 14, 16 through 20, 23, 26 through 33, 38, 39, 42, 45 through 48, 52 through 55, and 58 through 68, and Applicable Law paragraphs 1 through 7.

DID THE DISTRICT PROPOSE APPROPRIATE GOALS AND OBJECTIVES FOR STUDENT'S OT SERVICES FOR THE 2005-2006 SCHOOL YEAR?

4. No, it did not. This conclusion that the District did not provide appropriate goals and objectives in the IEP(s) for the 2005-2006 school year is based upon Factual Findings paragraphs 18 through 20, 27 through 33, 38, 41 through 43, 52 through 55, and 57 through 68. The conclusion is also based upon Applicable Law paragraphs 1 through 7 and 9 through 12.

5. While the District is correct that, under the *Rowley* case, it is not required to maximize a student's potential, the District is reading that case too narrowly as it applies to OT and what, exactly, constitutes a school "curriculum". The ALJ agrees with the Student who argues that curriculum is not just academics. The proposed IEP does not have OT goals, just a "written expression" goal which was intended to incorporate OT goals. However, without specific OT goals delineated in the IEP and specifically addressing fine motor areas that need attention, it is not possible for Student or her Mother to determine present levels of capability, to determine progress, or to even know if additional OT is necessary in the future.

6. The District gives Student an aide to help her turn pages if necessary, to help her eat, to help her go to the bathroom. The District (or CCS) provides a Stander for Student in class and straps for her wheelchair so that she does not slump when sitting. None of this gives Student assistance to learn her own basic living skills, which is definitely part of any school curriculum for any child. After all, no one expects a child over age two or three to go to school in diapers. If children that young go to school, they are taught to use the bathroom by school staff. If Student petitioner here is capable of strengthening her body so that she too can have that independence, and learn to feed herself and use the bathroom without assistance, she should be given the services needed to do so, as would any other child. The assessments done by Bethzaida Figueroa, Sandy Fitzpatrick and PT Mark Klem, as well as the testimony of Mr. Klem, indicate that Student has the potential

for additional physical progress. This is further substantiated by Ms. Hyman's testimony that Student met all the OT goals proposed by Ms. Figueroa.

7. Finally, the conclusion that the IEP was not appropriate as to OT is underscored by the lack of progress that Student made in her keyboarding skills. Those skills were one of the focuses of Student's IEP since at least 2001. In the last four and a half years, Student has only managed to increase her typing to the rate of about 2.7 words per minute. This cannot be defined as independently accessing her curriculum. It is apparent that other technology must at least be attempted to enable Student to function in the school environment. Significant, too, is the fact that Student does not have an aide to assist her at home with her homework. If she cannot type adequately, or be given an alternate technology to typing, she will not be able to keep up with her schoolwork, particularly as she moves from elementary to middle school and beyond.

IS THE OT PROGRAM DEVELOPED BY SANDY FITZPATRICK APPROPRIATE FOR STUDENT?

8. Based upon Factual Findings paragraphs 17 through 20, 27 through 33, and 52 through 55, as well as Applicable Law paragraphs 9 through 11, the ALJ finds that Ms. Fitzpatrick's OT program is very close to the one implemented by Ms. Figueroa and therefore is appropriate for Student. However, different methodologies can be formulated to meet the same goals; therefore, Ms. Fitzpatrick's program is not necessarily the *only* program that may be appropriate for Student. Further, based upon Applicable Law paragraph 16, the ALJ cannot order the District to hire Ms. Fitzpatrick even if the ALJ were inclined to do so. Ms. Fitzpatrick is not certified as a Non-Public Agency or a Non-Public School by the State of California. Additionally, based upon Applicable Law number 17, parents do not have a right to force a school to implement their preference of a program or provider.

IS STUDENT'S MOTHER ENTITLED TO REIMBURSEMENT FOR THE OT ASSESSMENT DONE BY SANDY FITZPATRICK?

9. No, she is not. Based upon Factual Findings paragraphs 49, 51 and 56 and Applicable Law paragraph 13, Mother is not entitled to reimbursement. The District has neither refused to assess Student nor been given the opportunity to assess her. First, Mother did not request that the District perform its own assessment before she asked the District to pay for her private assessment. Second, Mother has not permitted the District to perform its proposed OT assessment. As indicated in Applicable Law paragraph 13, Mother is only entitled to reimbursement if District refuses to assess Student, or, in the event that the District does assess Student, if it is shown that the District's assessment is not appropriate. Neither scenario is present here.

IS STUDENT'S MOTHER ENTITLED TO REIMBURSEMENT FOR THE OT SERVICES PROVIDED BY SANDY FITZPATRICK?

10. Yes, she is. Based upon the findings that the District failed to fully apply the OT program agreed to in the settlement of April 20, 2004, as stated in Legal Conclusions paragraphs 1 and 2, and the references to Factual Findings and Applicable Law in those paragraphs, the ALJ finds that the District should have been implementing Ms. Figueroa's program until either 1) Mother agreed to change the program via the IEP process or 2) The District obtained a legal determination that its proposed OT program was legally adequate. Either the District changed the program, through WGA, or Student achieved all her goals by June 2005, and has not been working on any new goals since that time. In either case, appropriate OT services have not been provided for many months. Mother is therefore entitled to reimbursement for services provided *up until the date of the due process hearing in this matter and not beyond that date*. However, to the extent that Mother has not paid Ms. Fitzpatrick for the services, the District will be ordered to directly reimburse her rather than Mother.

IS STUDENT ENTITLED TO COMPENSATORY OT EDUCATION OF A MINIMUM OF 30 ONE-HOUR OT SESSIONS TO BE PROVIDED TO HER UNTIL THE END OF 2006 IN HER HOME ENVIRONMENT?

11. No, she is not. This conclusion is based upon Factual Findings paragraph 47 and Applicable Law paragraphs 14 and 15. There is no evidence that Student needs compensatory education to ensure that Student is appropriately educated. First, her refusal to continue the OT services provided by WGA in Student's home was her own doing. Even if the program was not ideal, it provided some benefit to Student which she lost by refusing the services. Secondly, whatever Student may have lost was replaced by the private services Mother obtained from Ms. Fitzpatrick, which have been ordered reimbursed by the District. Therefore, the ALJ finds that compensatory education is not warranted in this case.

DOES STUDENT REQUIRE 2 HOURS OF DIRECT OT SERVICES AT HOME IN ORDER TO ADDRESS ALL OF HER UNIQUE NEEDS INCLUDING BUT NOT LIMITED TO FINE MOTOR/SELF HELP/FEEDING/HYGIENE NEEDS/VISUAL MOTOR SKILLS, ETC.?

12. No, she does not. There was no evidence produced at hearing that would substantiate a need for OT to be given solely at home. Based upon Factual Finding paragraph 51, as well as the fact that Student is receiving her education at school (Factual Finding paragraph 1) and not at home, it naturally follows that at least part of her OT must be given in the school environment. To find otherwise would prevent Student from fully accessing her education at school.

CURRENTLY, WHICH AGENCY/OT THERAPIST IS THE APPROPRIATE OT PROVIDER FOR STUDENT: THE PROVIDER SELECTED BY THE DISTRICT OR THE ONE SELECTED BY THE STUDENT?

13. The ALJ is not aware of any statute or case which provides support for Student's position that she has the option of selecting the therapist who will provide her OT at the District's cost. See, for example, Applicable Law paragraph number 17. While Ms.

Fitzpatrick's program may be the one to maximize Student's abilities, under the *Rowley* case, the District is not legally required to provide services that reach that maximal goal. Further, as stated above, any of a number of OT programs or methodologies could meet Student's needs. Moreover, as stated in Applicable Law paragraph 16, the ALJ cannot order the District to contract with Ms. Fitzpatrick, who is not certified by the State of California. Therefore, should Student wish to receive OT services at District expense, she must accept the provider selected by the District (with the caveat that the District must implement a broader OT program than that proposed in its last IEPs, as stated above.)

IS "REGULAR EDUCATION" OR "REGULAR EDUCATION WITH SUPPLEMENTARY AIDS AND SERVICES" THE APPROPRIATE DESIGNATION FOR STUDENT'S EDUCATIONAL PLACEMENT?

14. A placement designation of "Regular Education With Supplementary Aids and Services" is appropriate for Student at this time, based upon the Factual Findings in paragraphs 3 and 48. The parties are not presently disputing Student's actual educational placement. Rather, Mother contends that Student should not be "designated" a Special Day Class student because she is physically placed in a general education class and receives the majority of her education in that classroom, with pull-out educational services where necessary. The District contends that "Special Day Class" is a term that describes the fact that Student is receiving Special Education services, albeit mostly in a general education classroom. However, Student's SDC placement has been reduced from 98 percent in 2001 (Factual Finding paragraph 3) to 40 percent as of at least January, 2006 (Factual Finding paragraph 48.) Therefore, designating Student as being in a "Special Day Class" placement appears to contradict the reality that she spends the majority of her time mainstreamed in a Regular Education classroom and therefore, her placement designation should be written to mirror her actual placement.

ORDER

1. In order to determine Student's present needs, she needs to be assessed for OT services as proposed by the District. Within thirty days of the service of this Decision on the parties, the District is directed to conduct an OT assessment for Student, using the District's in-house therapist. The assessment should include the areas of visual motor skills, fine motor skill, perceptual motor skills, oral motor and feeding skills and self-help skills as these pertain to Student being able to access her curriculum at home and at school and being able to learn to become more independent in self-feeding and toileting. The District is directed to immediately provide Mother with a copy of the assessment once it is completed.

2. Within 30 days of service of this Decision, the District shall perform an AT assessment of Student to determine if any other technologies are available to assist her in accessing her education in light of Student's slow progress in increasing the speed and accuracy of her keyboarding skills. The District is directed to immediately provide Mother with a copy of this assessment once it is completed.

3. Within fifteen days of the completion of the AT and OT assessments, the District shall convene an IEP meeting to focus upon proper goals and objectives for Student with regard to her OT services. The IEP should consider the OT assessments previously obtained by Mother as well as the new OT assessment to be done by the District OTR and should propose goals and objectives in accord with this Decision. Student should continue to receive two hours of individual occupational therapy for at least six months, one hour at school and one hour at home, after which she should be evaluated to see if the provision of further OT services at that level is justified or if Student has in fact reached a plateau with regard to her development in any area which would might render future OT services in that area pointless. The OT should be designed to address Student's deficits as noted in the OT assessments.

4. Mother is directed to provide the District with billing from OTR Sandy Fitzpatrick for OT *services* provided to Student up until the first day of the due process hearing in this matter (March 8, 2006.) If Mother has paid Ms. Fitzpatrick for any of the services, she is to provide evidence of that to the District. Within sixty days of receipt of the billing, the District is to reimburse Mother for the cost of these services that Mother has paid and/or to directly reimburse Ms. Fitzpatrick if Mother has not yet paid for any or all of the billed services.

5. The District is directed to change the designation of Student's educational placement to reflect the fact that she is mainstreamed for sixty percent of her school day. "Regular education with supplementary aids and supports" would be an appropriate designation.

PREVAILING PARTY

1. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

2. Student is the prevailing party with respect to Issues Number 1, 2, and 3 in that the District failed to properly implement Student's full OT program since January of 2005 and failed to propose appropriate OT goals and objectives in the latest IEPs for Student.

3. No party prevailed on Issue Number 4.

4. The District is the prevailing party with respect to Issue Number 5 (a) in that it is not required to pay for the OT assessment performed by Sandy Fitzpatrick.

5. The Student is the prevailing party with respect to Issue Number 5 (b) in that Mother is entitled to reimbursement for OT services provided by Sandy Fitzpatrick to Student.

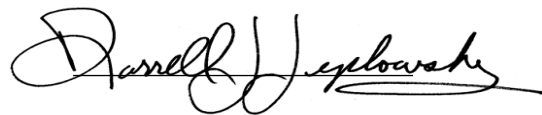
6. The District is the prevailing party with respect to Issues Number 6, 7 and 8.

7. The Student is the prevailing party with respect to Issue Number 9.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: April 12, 2006

A handwritten signature in black ink, appearing to read "Darrell L. Lepkowsky". The signature is fluid and cursive, with a long horizontal stroke at the end.

DARRELL L. LEPKOWSKY

Administrative Law Judge Special

Education Division Office of

Administrative Hearings